IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 42

GUY A. THOMPSON, TRUSTEE,
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR, AND
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, *Petitioners*,

v.

THE TEXAS MEXICAN RAILWAY COMPANY, *Respondent*

BRIEF FOR RESPONDENT

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v.

THE TEXAS MEXICAN RAILWAY COMPANY, *Respondent*

BRIEF FOR RESPONDENT

Statement of the Case

Petitioners' statement of the case is substantially correct except for two items of omission:

1. The one-year termination provision contained in the November 1, 1904, contract was inserted at the suggestion of the St. Louis, Brownsville and Mexico Railway Company to enable it to procure from Respondent a fifty-year contract instead of a five-year contract as proposed by Respondent (R. 161).

2. It was not until more than a year after both re-

spondents had appeared and answered to the merits that any question was raised with respect to the jurisdiction of the court below (R. 1, 48, 56).

ARGUMENT

Counter-Point One

Neither Sec. 1(18) of the Interstate Commerce Act nor any other applicable provision of law forbade the termination of the trackage contract of November 1, 1904.

Prior to 1940, the Interstate Commerce Commission had no direct jurisdiction over trackage contracts between carriers, and the only jurisdiction ever claimed or exercised by it was ancillary to its direct jurisdiction with regard to the extension of lines under such agreements, which required a certificate from the Commission under Sec. 1(18) of the INTERSTATE COMMERCE ACT. The 1940 amendment to the Interstate Commerce Act for the first time gave the Commission direct jurisdiction over trackage contracts by forbidding them to be made without approval of the Commission. Sec. 5(2)(a)(ii). 54 Stat. L. 905. This provision was no doubt inserted to make clear the Commission's jurisdiction over new contracts relating to prior operations lawfully initiated. This new provision, however, does not purport to grant the Commission any jurisdiction with regard to the termination of contracts or to prescribe contracts for carriers not desiring to enter into them. The Commission is as lacking in jurisdiction over such matters today as it was before. Since Sec. 5(2)(a)(ii) of the Act has no bearing on the present situation, the argument will be confined to considerations arising under Sec. 1(18).

Petitioners' contention is that, absent a certificate from the Commission authorizing abandonment of operations, trackage contracts are contracts in perpetuity regardless of their expiration date and regardless of provisions for termination. The Act does not say so; the Commission has not said so; no court has said so; only Petitioners say so. In view of the grave constitutional question such a construction of the Act would raise, it is submitted that something more than Petitioners' mere assertion should be presented in support of it. The uniform practice of the Commission has been to the contrary, and since Congress specifically dealt with trackage contracts in the 1940 amendment without making any change in this practice, it must now be deemed to have Congressional approval. GREAT NORTHERN RAILWAY CO. v. UNITED STATES, 315 U.S. 262, 275 (1942).

The Commission has consistently approved trackage contracts for terms shorter than perpetuity and containing provisions for cancellation on notice.[1] The Commission, indeed, refuses to approve long term trackage contracts without provisions for termination on notice, deeming such provisions necessary for the protection of the parties against changed conditions. CONSTRUCTION OF RAILROAD LINES IN EASTERN OREGON, 124 I.C.C. 529, 533 (1927). These decisions are clearly inconsistent with the view that trackage rights can expire or be terminated only pursuant to, and contemporaneously with, a certificate authorizing abandonment of operations. If the Commission has exclusive authority to fix compensation there would be no need for a termination clause since the compensation could be changed at any time. If such a contract can be terminated only in abandonment proceedings the clause is not only useless but misleading.

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[1] e.g. **B. & O. R. R. Co. Operation**, 202 I.C.C. 773 (1935); **Wabash Ry. Co. Operation**, 199 I.C.C. 179 (1334), 230 I.C.C. 145 (1938).

In CHICAGO & ALTON RAILROAD COMPANY v. P. T. & W. RAILWAY COMPANY, 146 I.C.C. 171 (1928), the Commission had before it a situation where the owner line had exercised its right to terminate a trackage contract, and the parties were thereafter unable to agree on new terms. The majority of the Commission held that Sec. 1 (18) of the Act forbade the discontinuance of the operations previously conducted under the contract without a certificate from the Commission authorizing abandonment of the operations. The Commission expressly held, however, that it was without authority to prescribe the terms or conditions under which the operations would continue, the parties being left to their legal remedies in that regard.[2] The same situation was later involved in QUANAH, ACME & PACIFIC RAILWAY COMPANY CONSTRUCTION, 158 I.C.C. 699 (1930), where the owner line exercised its option to terminate a trackage agreement and the parties were unable to agree upon the terms of a new contract. In these circumstances the Commission authorized the user line to abandon its operations previously begun under the terminated trackage agreement and to construct its own tracks as a substitute. A similar disposition was made in KANSAS, OKLAHOMA & GULF EXTENSION, 72 I.C.C. 392 (1922), where the trackage agreement expired by its terms and the parties were unable to agree upon a new contract.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY PROPOSED ABANDONMENT OF OPERATIONS, 202 I.C.C. 164 (1934), was an application to abandon operations under

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[2] Respondent is informed that after a three-judge court had declined jurisdiction of a suit to set the order aside on the ground that the order was negative, the P. T. & W. demanded and received additional compensation from the receivers of the Alton until the use of the line was finally abandoned. The question of damages for the use of the line after the termination by notice and before the new arrangement was concluded was settled by negotiation.

a lease in which the lessor requested the Commission, as a condition to granting the authority sought, to require that applicant perform its obligations under the lease. The Commission properly held that it had no jurisdiction over such matters, their jurisdiction being confined to "whether or not the public convenience and necessity permits the proposed abandonment of operations." A similar result was reached in CENTRAL RAILROAD COMPANY OF NEW JERSEY ABANDONMENT OF OPERATIONS, 207 I.C.C. 422 (1935).

The distinction between the termination of a contract and the termination of operations, which Petitioners choose to ignore, was clearly recognized by the Commission in ABANDONMENT OF LINE BY CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, 131 I.C.C. 421 (1927). The Rock Island was the beneficiary of a perpetual trackage contract over certain lines of the Denver and Rio Grande Western. In this proceeding the Rock Island sought authority, not for the abandonment of its operations over the trackage involved, but for abandonment of such operations under the contract. The Commission disclaimed any jurisdiction stating that it was " * * * not empowered to authorize the abandonment by a carrier of its mere right to operate over the railroad of another carrier, as distinguished from its operation over such railroad" (p. 429). While the Commission pointed out that the operation could not be abandoned without its consent, it held that it had "no jurisdiction over the contractual right of one carrier to operate over the road of another * * * " (p. 429). The application was dismissed for want of jurisdiction. In another case one of the parties to a union terminal contract petitioned the Commission to change the terms of payment provided in the contract. After elaborate argument, the full Commission, in a unanimous opinion, held that it was without jurisdiction in the premises. In so doing it said:

"While the act does disclose a policy of Congress of the nature alleged by complainants, and when this Commission acts in response to some duty imposed or authority created by the act it must act in such manner as to give effect to the legislative purpose, we must reject complainants' contention that we can assume jurisdiction and act to carry out that policy independently of some duty imposed or authority created by the act. We are invested with no roving commission to carry out the policy of Congress; our powers are those delegated to us by the various sections of the Interstate Commerce Act and other acts which define the standards of right and obligation and delegate to us the function of finding the facts, determining the issues, and making the regulations necessary to give effect to those standards. We have hereinabove examined the sections of the act relied upon and found therein no delegation of authority to act upon the state of facts herein presented. Statements of the courts above quoted as to our extensive powers to carry out the legislative intent were made in connection with our exercise of powers under specific provisions of the act. We cannot, in order to carry out what we conceive to be the legislative intent, exercise powers which are neither expressly delegated, nor reasonably necessary in order to effectuate powers which are expressly delegated."

KANSAS CITY SOUTHERN RAILWAY COMPANY v. KANSAS CITY TERMINAL RAILWAY COMPANY, 211 I.C.C. 291, 304 (1935), mandamus denied, U. S. v. INTERSTATE COMMERCE COMMISSION, 98 Fed. (2d) 268 (Ct. of App., D.C., 1936), cert. den., 305 U.S. 625. If the Commission lacked power to relieve a carrier from the provisions of a burdensome contract, it is difficult to understand how it has power to impose upon a carrier a burdensome contract notwithstanding it has been terminated by a clause expressly granting that right.

TAYLOR v. SANTA FE NORTHWESTERN RAILWAY COMPANY, 34 Pacific (2d) 1102 (N.M., 1934), cited by Petitioners, is authority only for what may readily be conceded —operations under a trackage contract may not, consistently with Sec. 1(18), be discontinued without authority of the Commission even though the contract itself is no longer in force and effect. In this case one railroad had perpetual trackage rights over another. The two companies had common officers and directors. In an apparent effort to circumvent a prior court decision (SAN JUAN COAL AND COKE COMPANY v. SANTA FE S. J. AND N. R. R. COMPANY, 298 Pac. 663) the affiliated companies entered into a contract by which the user company purported to reconvey to the owner the trackage rights previously enjoyed by it. The contract expressly provided that neither party should be required to procure authority from any regulatory body in order to carry out the agreement. A receiver was appointed for the user company and, upon refusal of the owner company to permit him to operate over the tracks in question, he brought suit to enjoin the owner company from interfering with such operations. Such a suit is expressly authorized by Sec. 1(20) of the INTERSTATE COMMERCE ACT. The owner line invoked the contract referred to in defense of the suit. The court very properly held that the contract could not be enforced when the effect of the enforcement would be to violate Sec. 1(18) of the INTERSTATE COMMERCE ACT. Since Respondent is in nowise interfering, or attempting to interfere, with the operations of Petitioners over its track, the case is clearly not in point.

Petitioners' contention that the contract and the operations under it, are one and indivisible is not only contrary to the decisions of the Interstate Commerce Commission referred to but is also inconsistent with the decision of this Court in CENTRAL NEW ENGLAND RAILWAY COMPANY v.

BOSTON & ALBANY RAILROAD COMPANY, 279 U.S. 415 (1929). In that case petitioner had acquired trackage rights over tracks belonging to the respondent under a contract expiring in 1940. In 1921, pursuant to authority granted by the Interstate Commerce Commission, petitioner abandoned its operations under the trackage agreement. Thereafter it refused to make the payments required by the contract, and respondent brought suit on the contract to recover them. Petitioner contended that the effect of the Commission's order authorizing abandonment of the operation was to put the contract at an end so that it was no longer liable for the payments therein provided for. This court did not pass upon the Commission's power to relieve petitioner from its contractual obligations but held that the Commission had not purported to deal with the contract and accordingly affirmed judgment in favor of respondent for the payments in accordance with the contract. Since a trackage contract may survive operations under it, it logically follows that operations under such a contract can survive its termination.

The Second Circuit Court of Appeals dealt with a similar situation in GASTON V. RUTLAND RAILROAD COMPANY, 35 Fed. (2d) 685 (1929). The proceeding involved an intervention by the Canadian National Railway Company in the receivership proceedings of the Rutland Railroad Company, petitioning the court to require the receivers to adopt and perform an executory trackage contract and lease. The receivers conceived the contract and lease to be burdensome to the estate and formally rejected it although the operations were continued as required by Sec. 1(18) of the INTERSTATE COMMERCE ACT. The Canadian National contended that the receivers could not repudiate the contract until they had procured authority from the Commission to abandon the operations. The court rejected this contention holding that the necessity of procuring authority from

the Interstate Commerce Commission to abandon the operations had no bearing whatever on the right to terminate the contract and lease. The court held, however, that, on the evidence, the trial court had properly required the receivers to adopt the contract and lease as beneficial to the estate.

In re CHICAGO RAPID TRANSIT COMPANY, 129 Fed. (2d) 1 (C.C.A, 7th, 1942), involved the reorganization of an intrastate carrier under Sec. 77B of the BANKRUPTCY ACT. Certain properties of the debtor were being operated under a lease from another carrier, and the trustees rejected the lease as burdensome on the estate. Thereafter the operations were continued by the debtor over the property formerly leased for the account of the lessor. The lessor contended, among other things, that the lease contract could not be terminated without prior authority of the Illinois Commission. The court pointed out the plain distinction between the contract and the operations and rejected the lessor's contention in the following language (p. 8):

> "Respondent also insists that the order infringes upon certain statutory enumerated powers of the Illinois Commission. Illinois Rev. Stat., c. 111 2/3, Secs. 49a and 27(b), Section 49a forbidding abandonment or discontinuance of an existing service without consent of the Commission applies only to physical abandonment by the utility. It does not refer to an involuntary change in legal obligations between the parties. City of Geneseo v. Illinois Northern Utilities Co., 378 Ill. 506, 39 N.E. (2d) 26. As pointed out the order to reject did not work abandonment of service. Rather it was court action working an involuntary legal change in obligations."

Prior to November 1, 1941, Petitioners' operations over the tracks of Respondent were consensual. After that date, the consensual operations ceased and thereafter it was an "in-

voluntary operation" imposed by law. Cf. PALMER v. WEBSTER & ATLAS BANK, 312 U.S. 156, 167 (1941).[3]

From the foregoing, it is clear that the courts and the Commission are in accord that (1) the termination of operations does not automatically terminate a contract relative thereto, that (2) the termination of a contract does not automatically terminate operations previously conducted under it and (3) that continuance of operations after termination of a contract does not automatically revive the contract. Petitioners' contention that Sec. 1(18) of the Act operates to extend a contract which has been terminated in accordance with its terms is, we submit, plainly without substance.

Respondent is invited to file an application with the Interstate Commerce Commission for authority to abandon the operations in question. Petitioners do not intend to make any such application (R. 35) and presumably would resist any application by Respondent. In TEXAS & PACIFIC RAILWAY COMPANY v. GULF, COLORADO AND SANTA FE RAILWAY COMPANY, 270 U.S. 266, 273 (1926), this Court held that an adversely interested carrier could not initiate proceedings before the Commission to determine whether pro-

[3] The effect on the owner's rights where a lease contract is terminated after bankruptcy of the lessee and where a trackage contract is terminated after the bankruptcy of the user company are quite different. In the case of a terminated lease, the Trustee continues to operate the properties for the account of the owner. This, on the theory that the owner, by leasing its properties, has incapacitated itself from performing its proper duties as a common carrier, and it thereby impliedly consents to the continued operation of the property, for its account, so as to carry out the duties it is legally obligated to perform. See Clark, Foley and Shaw, "Adoption and Rejection of Contracts and Leases by Receivers," 46 Har. L. Rev. 111 (1933). In the case of a trackage contract, however, the owning company is still in full possession and use of its properties, and there is no basis for the application of the rules applicable to lease contracts.

posed construction by another carrier would be in the public interest, from which holding it would seem to follow that an adversely interested carrier would not be authorized to institute proceedings before the Commission opposing operation by another carrier. Of similar import is POWELL v. UNITED STATES, 300 U.S. 276 (1937). Thus Respondent's rights to initiate any such proceedings is, to say the least, doubtful, but even if its right were certain, such a proceeding would not solve Respondent's problem. If authority were denied by the Commission, Respondent would still have to go to the court, as it has already done, to recover compensation for the use of its property since the Commission refuses to deal with such matters. CHICAGO & ALTON RAILROAD COMPANY v. TOLEDO, PEORIA & WESTERN RAILWAY COMPANY, 146 I.C.C. 171, 182. If the authority were granted, it would be permissive only, ABANDONMENT BY C. R. I. & P. RAILWAY, 131 I.C.C. 421, 431, and if Petitioners ceased their operations, Respondent would still have received no reasonable compensation for the use of its property without its consent and against its will. The short answer to this contention of Petitioners is, of course, that since the contract in question has been lawfully terminated, its present concern is only with procuring reasonable compensation for the use of its property without its consent, a matter with respect to which the Commission has repeatedly said it has nothing to do. It may here be added that Respondent filed with the Commission a petition for authority to cancel the trackage agreement in August, 1941 (R. 175-183), but the application was returned with a letter stating that the Commission was without authority to consider the application (R. 185).

A word remains to be said with regard to LOUISIANA AND NASHVILLE RAILROAD COMPANY v. MOTTLEY, 219 U.S. 467 (1911). This case holds nothing more than that a private

contract cannot stand against a Congressional enactment bottomed on the power to regulate commerce even though the contract was valid when made. This is familiar law but its pertinence to the present situation is not perceived. Respondent does not seek to enforce a contract which has been declared unlawful by Congress but is here seeking only to recover compensation for the use of its property against its will. Congress has compelled Respondent to permit the continued use of its property by Petitioners until such time as the Commission shall authorize the abandonment of such use, but nowhere has Congress said that Respondent is compelled to accept as compensation for such use the consideration provided in a contract which was terminated in accordance with its terms prior to the use for which compensation is sought.

The conditions which the Commission has found to require incorporation of termination provisions in long term trackage contracts have come about in this instance and were the reason for Respondent's termination of the contract in accordance with its terms. Some time after the execution of the 1904 contract, the St. Louis, Brownsville and Mexico began moving traffic into Corpus Christi over the lines of its affiliate company, San Antonio, Uvalde and Gulf Railroad Company (R. 31) with the result that the compensation paid to Respondent was greatly decreased since it was fixed on a wheelage basis. Furthermore, the wheelage basis of apportioning maintenance expense operated unfairly to Respondent since it now uses Diesel power exclusively, which causes vastly less damage to the roadbed than the heavy steam power employed by Petitioners (R. 170-171). The Respondent's termination of the contract was therefore no arbitrary or whimsical act but was for the purpose of protecting its properties and revenues. Respondent, being a short-line railroad

with small assets simply cannot afford to continue its contributions to its Class A competitor.

Counter-Point Two

The Interstate Commerce Commission is without jurisdiction to fix the compensation to be paid by Petitioners for their use of Respondent's track.

The Commission has no general power to compel one railroad to grant trackage rights to another even though the result is an unnecessary capital expenditure for new construction. CONSTRUCTION OF EXTENSION BY ALABAMA, TENNESSEE & NORTHERN R. R. Co., 124 I.C.C. 114 (1927). The Commission has likewise disclaimed any general jurisdiction to revise contracts and fix compensation for the use by one railroad of the tracks of another. KANSAS CITY SOUTHERN RAILWAY COMPANY v. KANSAS CITY TERMINAL RAILWAY COMPANY, 211 I.C.C. 291 (1935). In one very restricted field, however, and only in that field, Congress has granted to the Commission the powers which it has withheld from it generally. Sec. 3(5) of the Act authorizes the Commission, after making certain findings, to require one railroad to permit its terminal facilities to be used by another railroad on terms to be fixed by the Commission. That power is not here involved since the Petitioners refuse to invoke it for the purpose of settling the controversy. It is expressly provided, however, that if the owner of the property is dissatisfied with the compensation fixed by the Commission, the owner may sue in court to recover just compensation for the use of its property. Thus, even in this limited field, the Commission's power to fix compensation is neither exclusive nor final.

While the Commission has no authority to fix the com-

pensation received by one carrier for the use of the tracks of another except in proceedings under Sec. 3 (5), it does have a certain amount of indirect and negative power in relation thereto when its express powers are invoked under Sec. 1 (18) or Sec. 5 (2) (a) (ii) of the Act. This negative jurisdiction can arise only when the owner and user lines have agreed between themselves with respect to the compensation to be paid for the use.[4] Such contracts cannot lawfully be put into effect without authority of the Commission under Sec. 5 (2) (a) (ii), nor can operations be commenced under such contract without authority of the Commission under Sec. 1 (18). In either case the Commission may refuse to grant authority except on condition that the parties revise their agreement in accordance with the Commission's views. The parties are then free either to abandon the proposed contract and operations entirely or to revise their contract to meet the Commission's conditions. In neither case can it properly be said that the Commission fixes the compensation. The Commission does no more than present the parties with a choice, and the choice they make is their own voluntary action. In no other situation is there any statutory or other authority for the power of the Commission to exercise even negative power over such compensation.

TRANSIT COMMISSION, ET AL., V. UNITED STATES, ET AL., 289 U.S. 121 (1933), holds nothing more than that when carriers invoke the Commission's jurisdiction under Sec. 1 (18) for an extension of lines under a trackage agreement, the Commission has power to approve or disapprove the

[4] The considerations of policy adverted to in the **Transit Commission Case**, infra, which form the basis for conferring jurisdiction on the Commission with respect to trackage contracts are present only in the case of consensual arrangements. There is no chance for improper arrangements when the compensation for use is fixed by a judicial tribunal and not by the parties themselves.

agreement to the exclusion of state authorities claiming jurisdiction in the premises. It is simply an example of the exercise of the Commission's negative jurisdiction, above referred to, and plainly does not hold that a carrier may not sue in the court to recover for the involuntary use of its property by another carrier having no contractual right in the premises.

Petitioners, being unable to point to any specific authority in the statutes for their contention, refer to a supposed desirability for uniformity in compensation paid by one carrier to another for the use of its track, which uniformity can best be procured by giving the Commission exclusive jurisdiction of such matters, and from these considerations, they attempt to deduce that the Commission in fact has such exclusive jurisdiction. This argument, of course, could more properly be addressed to Congress, but it may be noted that insofar as Congress has spoken at all in this matter, it has not accepted Petitioners' views. Sec. 3(5), the only portion of the Act authorizing the Commission directly to fix the compensation to be paid by one carrier for the use and facilities of another, specifically provides that if the owner is dissatisfied with the compensation fixed by the Commission, it may resort to the courts in a plenary suit against the using carrier to recover "proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be." This is a clear-cut expression by Congress itself that it finds no interference with the policies of the Act in permitting courts and juries to determine the compensation to be paid by one carrier for the use of the facilities of another.

Petitioners suggest no procedure whatever for bringing before the Commission the question of compensation for the use of Respondent's tracks other than to repeat the sugges-

tion that Respondent file an application with the Commission requesting authority for Petitioners to abandon operations over Respondent's line. Even if Respondent were held to be a proper party to bring such proceedings and even if it were successful, there would still have been no fixing of compensation by the Commission. Surely it would not be contended that the Commission would have power to fix compensation for future operations, the discontinuance of which it had authorized, and it is equally certain that the Commission, on authorizing abandonment, would have no authority to go back retroactively and fix compensation for the use of the property between the termination of the contract and the authorization for abandonment. If Petitioners are dissatisfied with the compensation found by the court below and are in good faith in their contention that the Commission has authority, in abandonment proceedings, to fix compensation for the use of tracks, then it is difficult to understand why Petitioners, whose right to invoke Sec. 1 (18) is unquestioned, refuse to do so and content themselves with the claim that Respondent should perform this duty for them. Obviously, we submit, Petitioners are not interested in having the Commission or anyone else fix the compensation for its use of Respondent's track; they are interested only in perpetuating as long as possible the excessively favorable terms of the contract long since terminated.

Congress has expressly and unequivocally recognized the competence of courts and juries to pass upon the proper compensation to be paid by one railroad for the use and facilities of another. Nothing in the Act prohibits the courts from determining proper compensation where the parties cannot agree, and the Act sets up no procedure whatever by which the jurisdiction of the Commission can be invoked to fix compensation in such a situation. It is submitted, there-

fore, that the courts below properly held that they had jurisdiction in the premises.

Counter-Point Three

The proceedings in the Bankruptcy Court did not deprive the state courts of jurisdiction to determine the controversy.

Petitioners characterize Respondent's suit as one having for its purpose the cancellation of a contract and the disturbance of the Trustee's possession of property. This is not sustained by the record or the facts. Respondent's petition contained no prayer whatever asking for the cancellation of any contract but sought only to enjoin the future use of its property without its consent and to recover damages for such use in the past (R. 46-47). Respondent had no need for judicial cancellation of a contract which had already been terminated in accordance with its express terms, and the court's judgment did not purport to cancel such contract. The prayer for injunctive relief was not pressed, and the trial court expressly denied any such relief. Presumably the court refused this relief on the ground that it was without jurisdiction to grant it because forbidden by Sec. 1(18) of the INTERSTATE COMMERCE ACT. The suit thus resolved itself simply into a suit for damages for the use of Respondent's property against its will.

Petitioners assert that since there was a prayer for an injunction, which was denied, the suit must be taken as having for its main purpose, interference with the Trustee's possession of property, and the court was therefore powerless to try the separate issue raised by the prayer for damages. Apart from the fact that the granting of the injunction would not have interfered with any property in the

possession of the Trustee, this contention assumes that after the Trustee's plea to the jurisdiction was belatedly filed, the court was without power to do anything other than dismiss the suit forthwith. This is plainly not the law. State courts are not required to take judicial notice of bankruptcy proceedings, and they must be pleaded and proved by a defendant seeking to take advantage of them in accordance with the state practice. BOYNTON v. BALL, 121 U.S. 457, 467 (1886); COLLIER ON BANKRUPTCY, 14th ed., Par. 11.08. We know of no requirement in either the state or the federal law requiring a court separately to pass upon law and fact issues relating to its jurisdiction. These questions can properly be taken along with the case on its merits as is often done in this honorable court. For aught that appears in the record that is what was done below, and the court's denial of injunctive relief may as well have been based on its own finding of want of jurisdiction as upon the merits. If the state court otherwise had jurisdiction to try the issue as to damages, it is difficult to see how Petitioners can reasonably complain if the state court sustained their plea to its jurisdiction to the full extent which the law commanded it. There is nothing to the contrary in EX PARTE BALDWIN, 291 U.S. 610 (1934). There the Trustee had record title to, and was in possession of, real property. Plaintiff sought to cancel the deed under which the Trustee held and to remove cloud from title. As incidental thereto plaintiff sought to recover damages for alleged breach of a covenant in the very deed he was asking the court to cancel. The court held that the main purpose of the suit was cancellation of the deed and that the count for damages was merely incidental thereto. Here plaintiff is in possession of its property, title to which is not in dispute. It seeks to recover damages for the use of its property in the past and its prayer for injunction, which was denied, was merely incidental and for the purpose of preventing

future damages and further suits which it later found it could not prevent because of Federal law.

Insofar as the Trustee is concerned, this suit was clearly authorized, both by statute and by an order of the Bankruptcy Court. Sec. 66 of the JUDICIAL CODE (Title 28, Sec. 125 U.S.C.) expressly authorizes suits against a trustee "in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed." Furthermore, the Bankruptcy Court, by order dated May 9, 1933, authorized the Debtors "to defend or liquidate by written agreement or consent and judgment any claim, action, proceeding, or suit now pending against any of said Debtors, or which may hereafter be asserted or be brought in any court or before any officer, department, commission, or tribunal to which any such Debtor is or shall be a party," but with the limitation that no action thus taken by the Debtor should have the effect of establishing any claim upon or right in the property or funds in the possession of the Debtor that otherwise would not exist (R. 121-122). By order dated July 25, 1935, the same powers were conferred upon the Trustee (R. 118). Thereafter, on motion of the Trustee, this order was modified so as to stay suits against the Debtors as well as all suits against either the Debtors or the Trustee seeking to enforce a lien on property of the Debtors in the hands of the Trustee (R. 124). The order of May 9, 1933, was never revoked or otherwise modified insofar as the Trustee is concerned. Thus, the Trustee has clearly been authorized by the court appointing him to defend this suit unless, as will hereafter be discussed, the suit interferes with possession of properties in

the hands of the Trustee.[5] So far as concerns Sec. 66 of the JUDICIAL CODE, Petitioners contend that it was intended to apply only to suits for damages in negligence cases. This court has not so interpreted the Act, and in MCNULTA v. LOCHRIDGE, 141 U.S. 327, 332 (1891), the right to sue was referred to as "unlimited" with respect to the trustee's "contracts, misfeasances, negligences and liabilities." In ANDERSON v. SCANDRETT, 19 F. Supp. 681 (D.C., Minn., 1937), for example, this section was held to authorize a suit against trustees of a railroad reorganization for patent infringement arising out of the continued use by the trustees of certain switch frogs where the use had begun under a license agreement with the debtor which was later terminated. The operation of trains over facilities belonging to Respondent is as clearly an act or transaction of the Trustee in carrying on the business as anything could be, and Respondent's suit seeks only to recover damages it claims for the use of its property in connection with such acts and transactions.

Petitioners' main contention seems to be, however, that the judgment below violates the general rule against state courts interfering with property in the possession of bankruptcy courts as well as the injunction issued by the Bankruptcy Court against interfering with the " * * * railroad's properties and premises belonging to or in the possession of any of the Debtors, or from taking possession of, or in any way interfering with the same, or any part thereof * * * "

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[5] If the Trustee believed that the suit below would interfere with property in the possession of the court or the Trustee, in violation of the court's general order, he could have invoked the jurisdiction of the Bankruptcy Court to procure a specific injunction against this particular suit. In his plea to the jurisdiction, he impliedly threatens to invoke this jurisdiction, but whether the attempt was ever made is not known to Respondent. If it was made, it was evidently unsuccessful since no such specific injunction was ever entered in the Bankruptcy Court.

(R. 122). If the Bankruptcy Court or the Trustee had in their possession a *res*, the possession of which was disturbed or interfered with by the judgment below, Petitioners' contentions would undoubtedly be correct, but the fact is that the courts below did not purport to deal with any *res* in possession of the Trustee or the Bankruptcy Court but did nothing more than liquidate a claim against the Trustee arising out of his operation of the Debtor's property. Because of the bankruptcy proceedings, the trial court expressly withheld execution of the judgment and only permitted it to be filed as a claim to the bankruptcy proceedings (R. 90-91). Petitioners assert, however, that the contract of 1904 was a *res* in possession of the Trustee, possession of which was disturbed by the judgment. This contention entirely overlooks the nature of the contract and the Trustee's rights under it. The Trustee at no time expressly adopted the contract, and if he did not adopt it, he obviously never acquired any rights under it. If, on the other hand, his failure to reject be given the effect of adoption, then he took the contract in the same plight as the Debtor held it. He took it as a whole and was bound by all of its terms. JOHNSON v. KURN, 95 Fed. (2d) 629 (C.C.A., 8th, 1938), and cases there cited. It then became his contract and the Debtor no longer had any rights or liabilities under it. IN RE SCRUGGS, 205 F. 673 (D.C., Ala., 1913); ROSENBLUM v. UBER, 256 F. 584 (C.C.A., 3rd, 1919). The rights conferred by this executory contract were personal only and did not give the user line any interest in Respondent's property. DES MOINES AND FT. DODGE R. R. CO. v. WABASH, ST. L. AND PACIFIC RAILWAY CO., 135 U.S. 576 (1890); KANSAS CITY TERMINAL RAILWAY CO. v. CENTRAL UNION TRUST CO., 294 Fed. 32 (C.C.A., 8th, 1923); DETROIT, P. & I. R. CO. v. DETROIT AND T. S. L. R. CO., 6 Fed. (2d) 845 (C.C.A., 6th, 1925). The Trustee

thus received merely a limited personal privilege to run trains over the tracks of Respondent described in the contract for the period of time provided in the contract. The contract expressly provided that either party might terminate it upon the giving of one year's notice. Petitioners concede in their brief (p. 3) that Respondent gave the required notice in such manner as to terminate the contract, in accordance with its provisions, November 1, 1941. Petitioners even inadvertently state that after that date operations were continued, not under the contract, but "in compliance with the requirements of Sec. 1(18) of the Interstate Commerce Act." The provision for termination on notice was self-executing and ended the contract, and the Trustee's rights under it, as effectually as if the date had been November 1, 1954.[6] The subsequent judgment of the state court did not terminate or purport to terminate the contract for it had already come to an end in accordance with its own terms, and the award of damages to Respondent for the use of its property did not disturb possession of the Trustee for he then had no possession to be disturbed. He no longer possessed even an intangible right, but at most a mere claim that a previously terminated right had been extended by Sec. 1(18) of the INTERSTATE COMMERCE ACT.

The distinction between suits against a receiver or trustee in bankruptcy for judgment *in personam* and those involving title to property in his possession or the possession of the

[6] Of course, if Petitioners are correct in their interpretation of the effect of Sec. 1(18), the expiration date of the contract was as meaningless as the provision for its termination on one-year's notice. The contract, according to Petitioners, is converted by Sec. 1(18) into a contract in perpetuity unless the Commission authorizes the abandonment, not of the contract, but of the operations.

Bankruptcy Court is clearly illustrated by the situation where he has taken property into his possession, under claim of right, belonging to a third party. While replevin will not lie in a state court to recover possession of the property, the trustee or receiver may be sued in trover in the state court even though the question of his right to the property would be incidentally involved. IN RE SPITZER, 130 Fed. 879 (C. C. A., 2nd, 1904); IN RE KANTER & COHN, 121 Fed. 984 (C.C.A., 2d, 1903); IN RE MERTENS, 147 Fed. 182 (C.C.A., 2d, 1906), all cited by this Court with approval in HEBERT V. CRAWFORD, 228 U.S. 204, 210 (1913). In KILTON V. CODINGTON, 77 N.E. 790 (1906), the Court of Appeals of New York sustained the jurisdiction of the state court to enter a judgment against a trustee in bankruptcy to recover the amount due plaintiff on a note and chattel mortgage. The chattel mortgage covered the stock of goods of the bankrupt, which had been taken into possession by the trustee and later sold by him, under order of the court, the proceeds being retained to satisfy any liens. The trustee asserted that the state court had no jurisdiction over the cause of action, because the fund was in the possession of the bankruptcy court. This contention was rejected on reasoning which was expressly approved by this Court in FRANK V. VOLLKOMMER, 205 U.S. 521, 529 (1907). Thus even if Petitioners were correct in their erroneous contention that "title" to property in the hands of the trustee was in some way incidentally involved in the proceedings below, the jurisdiction of the state court to enter a money judgment against the Trustee would still not be defeated.

Whether Respondent's suit be regarded as one in quasi-contract or one in tort, it is perfectly clear that it was not one to try title to any property in the possession of the Trustee. Respondent's ownership and possession of the line

of railroad involved in the suit is undisputed. Pleading and proof of that ownership and possession, and invasion by the defendant, made out Respondent's prima facie case, and if Petitioners relied upon any contractual privilege to do the acts complained of, the burden was on them to plead and prove such contractual rights. MILTON v. PUFFER, 207 Mass. 416, 93 N.E. 634 (1911). When Petitioners invoked the previously terminated contract of 1904 in defense of Respondent's suit, it amounted to a claim by them with respect to use of property in the undisputed possession of the Respondent. That the operations involved may have been continued involuntarily by operation of law (Sec. 1 (18) of the INTERSTATE COMMERCE ACT) did not change the posture of the parties in the suit below. Petitioners have never had, or claimed, any title to Respondent's tracks but have claimed only a limited personal privilege to run trains over certain of them. Respondent submits that, far from it attempting to interfere with property in the possession of Petitioners, Petitioners are affirmatively asserting rights in property concededly owned and in the possession of Respondent. A somewhat similar situation arose in BENNETTE v. LEWIS, 176 S.W. 660 (T.C.A., Galveston, 1915, err. den.), where suit was brought by the owners of certain timber land to enjoin a trustee in bankruptcy from entering upon the land and cutting the timber pursuant to a contract which plaintiff claimed to be void for lack of consideration. The trustee defended on the ground that the suit amounted to an attempt to interfere with property in the possession of the Bankruptcy Court and that the state court was consequently without jurisdiction. The court very properly held that the plaintiff was in possession of the property and that the purported contract authorizing the trustee to enter and cut the timber did not give him any possession of it, constructive or otherwise. The court, in consequence,

reversed the decision below and ordered the issuance of a temporary injunction against the trustee prohibiting him from entering and cutting timber until the case could be disposed of on the merits. The trustee in this case was in far stronger position than the Trustee here, since he had an apparent existing contractual right to enter and cut the timber which the owner could overcome only by going outside the contract itself. In the present case the Trustee has no apparent right from the contract itself since, if its terms are applicable, it has been terminated; and the Trustee must go outside the contract to make even a color of claim of right to come upon Respondent's tracks. See also RICE v. KELLY, 10 S.W. (2d) 1112 (Ky., 1928), where the jurisdiction of the state court was upheld against the contention of exclusive jurisdiction in the bankruptcy court because the effect of the judgment in the state court was to interfere with a contract right in the trustee to purchase the property involved in the suit.

Another well considered case is ANDERSON v. SCANDRETT, 19 F. Supp. 681 (D.C., Minn., 1937), where the trustees of a railroad in reorganization were sued outside the bankruptcy court for patent infringement in connection with the use of certain frogs which had been installed and previously used by the debtor pursuant to a license agreement which had been terminated. Despite the termination the trustees continued the use of the allegedly infringing frogs, and suit was filed against them for injunction and damages. The court held that the suit came within Sec. 66 of the JUDICIAL CODE, despite the contention of the trustees that the jurisdiction of the bankruptcy court was exclusive, saying:

> "Nor does the injunction in the order of the appointing court prevent the institution and prosecution of this suit in this jurisdiction. True, an injunction is sought with an accounting of profits and damages, but the de-

termination of the issues herein will not violate the restraining order that was entered, nor will the institution of this suit interfere with the trustees' operation of the railroad. Any injunction that may be entered herein must be limited so as to comply with the appointing court's order; for instance, to permit the railroad to keep the alleged infringing devices upon paying reasonable compensation and to enjoin future infringement. But there is no basis for the contention that suits arising by reason of the operation of this railroad by the trustees must be lodged in the venue of the appointing court. The very impracticability of such procedure is apparent. Certainly, it could not be urged that all the shippers doing business with the railroad company while under trusteeship must proceed with their claims before the appointing court. It is recognized that the appointing court must have complete and exclusive jurisdiction to prevent any interference with the property of the debtor which will hinder or delay the ultimate reorganization, but the determination of claims that will not be discharged by the bankruptcy proceedings may be determined in any forum where jurisdiction is obtained. The relief to be granted, if any, in view of the injunction of the appointing court can be determinated later." (p. 683.)

Insofar as the suit is against the Debtor, different considerations are applicable. No question of jurisdiction is involved, and this was clearly recognized by the Debtor since it filed only a dilatory plea asking that the suit be stayed as against it until final judgment in the bankruptcy proceedings (R. 62-63). The Bankruptcy Court's stay order was purely for the benefit of the Debtor and could be waived by it. BOYNTON v. BALL, 121 U.S. 457, 467 (1886). Since the Debtor did not attempt to avail itself of the Bankruptcy Court's stay order until more than a year after it had answered on the merits, it would seem that the State Court could prop-

erly treat the right to invoke it as having been waived and try the case, as against the Debtor, as if no stay order had ever been entered. But even if this were not true the stay order entered by the Bankruptcy Court did not bar the suit, but, if applicable, only suspended the proceedings until final judgment in the Bankruptcy Court. HILL v. HARDING, 107 U.S. 631 (1882). The court's amended stay order, as required by Sec. 77(j) of the BANKRUPTCY ACT, expressly excluded "suits or claims for damages caused by the operation of trains * * * " and authorized such suits to be filed and prosecuted to judgment in any court of competent jurisdiction (R. 125). It would seem clear that the state court had jurisdiction to determine whether the suit fell within or without this exception. If exclusive jurisdiction to determine this question were in the Bankruptcy Court, any plaintiff, in any suit against the Debtor, would be required, in effect, first to procure leave from that court, and thus the Congressional mandate would effectively be evaded. Respondent's claim, as stated in its pleadings, was against the Debtor and the Trustee jointly. It claimed damages against both defendants, and the damages claimed were alleged to have been caused by the operation of trains over its tracks. It was as much a suit for damages growing out of the operation of trains as if one of Petitioners' locomotives had negligently set fire to some portion of Respondent's right of way. The kind of claim is the same, whether the damage be accomplished quickly by means of fire, or more slowly by means of the pounding of Respondent's roadbed by the heavy power used by Petitioners and by interfering with Respondent's own operations. In the circumstances the court below could properly conclude that the stay order did not require a suspension of the proceedings against the Debtor and proceed to a trial on the merits. On the merits the court apparently found that Respondent had failed to prove its

allegation that the Debtor had operated any trains over its tracks, or caused it any damage, since it refused to award any damages against the Debtor. It did, however, enter a joint judgment against the Trustee and the Debtor for costs of suit. If this was error, it was not error over which this Court has any jurisdiction but should have been corrected, if at all, in the state court and this is true irrespective of any question of waiver. If the state court had jurisdiction over the subject matter and over the Debtor, then it had jurisdiction as much to enter an erroneous judgment for costs as to enter a correct judgment on the merits. Furthermore, even if the court were incorrect in its interpretation of the nature of Respondent's suit, and even ignoring the question of waiver, the Debtor would not, as contended by it, be entitled to a dismissal but only to an order suspending the proceedings against it until final judgment in the Bankruptcy Court.

Respondent is not unmindful of the necessity for the orderly disposition of a bankrupt's affairs in a single court. It is likewise aware that these necessities will often cause hardship to creditors or other persons having had dealings with the bankrupt. It does submit, however, that such hardships should not be extended beyond the actual necessities of the case. When, as here, a Trustee in bankruptcy operates properties extending over many states to points far removed from the seat of the Court of Bankruptcy, there is surely no imperative necessity that claims arising out of such operations be determined solely in the Bankruptcy Court. Suits against the Trustee arising out of such operations in nowise interfere with the possession or operation of the properties or with the objects of the bankruptcy since they do nothing more than liquidate claims, the disposition of which is later determined by the Bankruptcy Court. Long ago this Court said, in EYSTER v. GAFF, 91 U.S. 521, 525 (1875):

> "The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt, the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except insofar as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions."

Respondent here owns, and is in undisputed possession of, a line of railroad situated some thousand miles away from the Bankruptcy Court. The Trustee is running trains over a portion of these tracks, and Respondent is powerless to prevent this use of its property because of Sec. 1 (18) of the INTERSTATE COMMERCE ACT. Respondent's title and possession is clear, and the Trustee's invasion of it is equally clear. The Trustee makes, and can make, no claim of title to Respondent's property but asserts only that he is entitled to pay less for his use of it than an independent court of justice has found he should pay. The damages suffered by Respondent from his operations can only be determined, according to him, by a court one thousand miles away from where his activities have occurred. The hardship

resulting to Respondent by sustaining any such contention is manifest and would be imposed upon Respondent in the very teeth of a contrary Congressional policy expressed in Sec. 66 of the JUDICIAL CODE. Such a hardship would be visited not only on Respondent but would establish a rule requiring property owners anywhere, whose property had been invaded by the Trustee, to go to the Bankruptcy Court to protect their rights on the mere assertion by the Trustee that his rights were superior to the owner of property in possession of it. If it were not for the compulsion of Sec. 1(18) of the INTERSTATE COMMERCE ACT, there could be no doubt whatever of Respondent's right to bring this suit and, indeed, to prevent Petitioners from using its property at all. The fortuitous circumstance that Respondent cannot lawfully prevent Petitioners' invasion of its property, itself a hardship, should not impose upon Respondent the additional hardship of proving its damages a thousand miles away from where they occurred.

The cases cited by Petitioners are not in point. They all involved proceedings to determine title to real property in the actual or constructive possession of the Trustee or to protect, by specific injunction, the equity of the bankrupt in mortgaged property. No one now questions that a bankruptcy court has exclusive jurisdiction to determine title to property in its actual or constructive possession, or its right to prevent the bankrupt's equity in property from being destroyed by foreclosure. However, none of these cases even intimate, much less hold, that when a trustee invades property admittedly owned by, and in possession of, one not a party to the bankruptcy proceedings, the bankruptcy court has exclusive jurisdiction to determine the question of whether such invasion is with or without the consent of the owner and what damages the owner is entitled to recover for such invasion.

Conclusion

The position of Petitioners, by ordinary standards at least, is something short of just and fair. What they bargained for was the privilege of using a portion of Respondent's property, for a favorable consideration, until such time as the privilege should be terminated in accordance with the contract. On November 1, 1941, when the contract was terminated in accordance with its express terms, Petitioners had already received the full measure of their bargain. Not only is this true, but because of the provisions of an unanticipated Act of Congress, Petitioners are already receiving something more than they bargained for—the continued privilege of using Respondent's property upon payment only of the reasonable value of the use thereof as determined by a court. Not satisfied with this windfall, they seek to pound Respondent's roadbed indefinitely for a consideration fixed forty years ago by a contract now terminated in accordance with its own terms, which consideration is far less than what an independent judicial tribunal has found presently to be the reasonable value of such use. Such a position is so contrary to reason and justice that no court, we submit, should sustain it. Respondent, on the other hand, seeks to reap no unfair advantage over Petitioners. It seeks only to recover its damages for the use of its property without its consent, the measure of which damages is the reasonable value of the use of its property as determined, not by itself, but by an independent judicial tribunal. In terminating the contract as it did, it has done nothing more than exercise a right which the Interstate Commerce Commission has said any carrier should reserve to itself in long term trackage contracts to protect its properties and its revenues against changed economic conditions which would make a continuation of the contract unjust or unfair to it.

Petitioners' contention with regard to the jurisdiction of

the Bankruptcy Court likewise calls for the imposition upon Respondent of a manifest injustice. Without disputing the title and possession of Respondent, and without disputing that the 1904 contract was long since terminated if its terms alone be looked to, Petitioners' claim that their mere assertion that something outside the contract has revivified it converts Respondent's suit for damages for invasion of its property without its consent and against its will into a suit to try title to property in the hands of the Bankruptcy Court and cognizable only there. This, despite the fact that the operations giving rise to the suit took place in Texas, and the Trustee is as well able to defend his actions there as elsewhere while requiring Respondent to go a thousand miles away to vindicate its rights would entail grave hardship and inconvenience on it without such hardship being required by any of the exigencies of the bankruptcy administration. The trial of the case in the state court in Corpus Christi entailed no additional inconvenience to the Trustee over that which he would have suffered by trial in the Bankruptcy Court in St. Louis. Obviously, he is not concerned with the legitimate demands of the bankruptcy reorganization but only with making it as difficult as possible for Respondent to recover reasonable damages for the use of its property.

The judgment below was right and should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 42.—October Term, 1945.

Guy A. Thompson, Trustee, The St. Louis, Brownsville and Mexico Railway Company, Debtor, and the St. Louis, Brownsville and Mexico Railway Company, Petitioners,
vs.
The Texas Mexican Railway Company.

On Writ of Certiorari to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

[April 29, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

Brownsville (The St. Louis, Brownsville and Mexico Railway Co.) and Tex-Mex (The Texas Mexican Railway Co.) are interstate carriers by railroad and subject to the provisions of the Interstate Commerce Act. 24 Stat. 397; 41 Stat. 474, 49 Stat. 543, 54 Stat. 899, 48 U. S. C. § 1. On November 1, 1904, they entered into a written contract whereby, for payment of specified rentals, Tex-Mex granted Brownsville the right to operate its trains over the tracks of Tex-Mex between Robstown and Corpus Christi, Texas, and to make use of terminal facilities of Tex-Mex at Corpus Christi. The contract provided that it was to continue for a term of 50 years from its date unless sooner terminated by the parties. And it contained the following provision, "It is further agreed that this contract may be terminated without giving any reason therefor, by either party, upon giving twelve months notice of such intent to terminate the lease."

In 1933 Brownsville filed its petition for reorganization under § 77 of the Bankruptcy Act.[1] The petition was approved and petitioner Thompson was appointed as trustee in the proceeding. Shortly thereafter the bankruptcy court entered stay orders to which we will later refer. In October, 1940 Tex-Mex notified petitioners that it was exercising its right to terminate and cancel the trackage contract, effective twelve months after November 1, 1940. The trustee, however, continued to operate over the Tex-Mex and

[1] This petition was filed in the reorganization proceedings of the Missouri Pacific R. Co. which owned about 94 per cent of the voting stock of the New Orleans, Texas and Mexico Ry. Co., which in turn owned all of the voting stock of Brownsville.

to use the Tex-Mex facilities after November 1, 1941. Tex-Mex informed him that a charge of $500 per day would be made for the use of these facilities—an amount in excess of the rental under the contract. The trustee refused to pay any rental other than that specified in the contract.

Thereupon this suit was instituted by Tex-Mex in the Texas courts to enjoin Brownsville and its trustee from using the tracks or other facilities without the consent of Tex-Mex and to recover $500 a day damages for such use or, alternatively, the reasonable value of the use of the property. The trial court overruled pleas to its jurisdiction and tried the case on the merits. It denied an injunction. It held that the 1904 contract had been terminated and awarded Tex-Mex damages in the amount of $184,929.85. The Court of Civil Appeals affirmed.[2] 181 S. W. 2d 895. The Supreme Court of Texas refused an application for a writ of error. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problems in the administration of the Interstate Commerce Act and of the Bankruptcy Act.

First. It is contended here, as it was in the state court, that the maintenance of the present suit is precluded by the stay orders issued by the bankruptcy court and by § 77 of the Bankruptcy Act.

Sec. 66 of the Judicial Code, 28 U. S. C. § 125, authorizes suits against the trustee, without leave of the bankruptcy court, "in respect of any act or transaction of his in carrying on the business."[3] In *McNulta* v. *Lochridge*, 141 U. S. 327, 332, this statute was said to grant an "unlimited" right "to sue for the acts and transactions" of the estate. Operation of the trains is plainly a part of the trustee's functions. Claims which arise from their operation—whether grade crossing claims as in *McNulta* v. *Lochridge, supra*, or claims for the use of the tracks of another as in the present case—are claims based on acts of the trustee in conducting the business. Hence this suit, so far as it involves only a money claim against the estate for acts of the trustee in oper-

2 No complaint was made on appeal of the denial of an injunction.

3 "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

ating trains over respondent's tracks, could be maintained in the state courts against the trustee.[4] And the stay orders entered were wholly consistent with this course.[5]

It is argued, however, that this suit cannot be maintained consistently with the provisions of § 77 which grant the reorganization court exclusive jurisdiction over the debtor and its property.[6] The theory is that the suit interferes with the administration of the estate, adjudicates the trustee's interest in property in his possession, and indeed seeks to disrupt the operating schedule of trains. It is clear that the issuance of an injunction against operation of the trains over respondent's tracks would have been an interference with the exclusive jurisdiction of the reorganization court. The fact that no injunction was granted is not a decisive answer. In *Ex parte Baldwin*, 291 U. S. 610, 618, the Court held that the exclusive jurisdiction of the bankruptcy court is determined by the "main purpose" of the suit. In that case suit had been brought in the state courts to have a railroad right of way declared forfeited and in addition to recover damages. The claim for damages was held to be "merely an incident" to the suit for a forfeiture and did not save the suit from the defense that it was of the type which sought to interfere with the exclusive jurisdiction of the bankruptcy court. We do not construe the present bill as having as its main object the stoppage of the movement of petitioner's trains over respondent's tracks. The main purpose of the suit seems to be an attempt on the part of respondent to obtain a more favorable rental.

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[4] Judgment for damages was granted only against petitioner, trustee; judgment for costs was granted against the trustee and Brownsville jointly and severally.

[5] The stay orders authorized the trustee to defend any suits which might be brought.

In view of our disposition of the case it is unnecessary to decide at this time whether or not the suit may also be maintained against Brownsville. The stay order, entered for the benefit of the debtor, followed the provisions of § 77(j) of the Bankruptcy Act, 49 Stat. 911, 922, 11 U. S. C. § 205(j) and provided: "That commencement or continuation of suits against any of the debtor companies is hereby stayed and enjoined until after final decree entered in these proceedings, provided, however, that suits or claims for damages caused by the operation of trains, buses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction, and any order heretofore staying the prosecution of any such causes of action or appeal is hereby vacated."

[6] Sec. 77(a) provides in part. "If the petition is so approved the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located."

The fact, however, that respondent's suit does not have as its main purpose the ouster of petitioners from possession is not a complete answer to the plea to the state court's jurisdiction. As *Ex parte Baldwin, supra*, p. 616, held, the exclusive jurisdiction of the bankruptcy court is not limited to protecting the possession of the trustee; it "extends also to the adjudication of questions respecting the title." See *White* v. *Schloerb*, 178 U. S. 542; *Whitney* v. *Wenman*, 198 U. S. 539. Petitioners argue that the present case comes within that principle. It is pointed out that this suit seeks the cancellation of the trackage agreement. It is argued that the rights granted Brownsville under that agreement are property rights; and that a suit to cancel the agreement and collect amounts other than the specified rentals is a suit which interferes with and adjudicates title to the property. If we were dealing here with a lease, a suit to effect its forfeiture could not be maintained in another court without consent of the reorganization court. But the trackage agreement created only a personal obligation and did not purport to grant Brownsville any estate in the property of Tex-Mex. See *Des Moines & Ft. Dodge R. Co.* v. *Wabash, St. Louis & P. Ry. Co.*, 135 U. S. 576, 583; *Union Pacific Ry. Co.* v. *Chicago, Milwaukee & St. P. Ry. Co.*, 163 U. S. 564, 582-583. It was an executory contract subject to termination on a specified notice. The exclusive jurisdiction of the reorganization court was a barrier to any action by any other court which would disturb the possession of the trustee or interfere in any way with his operation of the business. But, apart from the qualification to which we will later refer, litigation restricted to the amount due under a contract, express or implied, for the use by the trustee of another's property no more interferes with the administration of the estate than suits to determine his liability under contracts calling for the delivery of coal or other supplies. In each the claim is reduced to judgment and may then be presented to the bankruptcy court for proof and allowance. Cancellation of a contract pursuant to its terms alters, of course, rights and duties of the trustee. But the bankruptcy rule is that he takes the contracts of the debtor subject to their terms and conditions. Contracts adopted by him are assumed *cum onere*.[7] The general rule is (1) that if the other party had a right to terminate the arrangement, that right survives adoption of the contract by the trustee; and

[7] See Greif Bros. Cooperage Co. v. Mullinix, 264 Fed. 391, 397; 4 Collier on Bankruptcy (14th ed.), § 70.43.

(2) that the incidence of termination, except as it interferes with the exclusive jurisdiction of the bankruptcy court, may be litigated in any court where the trustee may be sued. That rule of bankruptcy is applicable to proceedings under § 77 by reason of § 77(l) which provides:

> "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

But, as we shall see, the qualification in § 77(l) that the rule of bankruptcy be "consistent with the provisions" of § 77 made premature an adjudication by the court that the contract was terminated, prior to a determination by the Interstate Commerce Commission that that step was consistent with the reorganization requirements of the debtor.

Second. Prior to the rendition of judgment on the merits the decision of the Interstate Commerce Commission was necessary on two phases of the controversy—one under § 77 of the Bankruptcy Act, the other under provisions of the Interstate Commerce Act.

(1) As we have said, the right to terminate a contract pursuant to its terms survives the bankruptcy of the other contracting party. And that general bankruptcy rule is applicable in § 77 proceedings by reason of § 77(l), which, as we have said, incorporates into § 77 the rules governing the duties of debtors and the rights and liabilities of creditors so far as they are "consistent with the provisions" of § 77. We have considered the meaning of that qualification in No. 384, *Smith* v. *Hoboken Railroad, W. & S. C. Co.*, decided this day. We there held that a covenant of forfeiture in a lease of railroad tracks and facilities should not be enforced by the bankruptcy court prior to a determination by the Commission that such step would be consistent with the reorganization requirements of the debtor. The Commission has the primary responsibility for formulating plans of reorganization under § 77. See § 77(d). Forfeiture of leases by the court in advance of a determination by the Commission of the nature of the plan of reorganization which is necessary or desirable for the debtor may seriously interfere with the performance by the Commission of the functions entrusted to it.

We think that the same considerations are applicable to a determination that the trackage agreement in this case should be terminated pending formulation of a reorganization plan. By § 77(b) the plan of reorganization may adopt or reject executory contracts of the debtor as well as unexpired leases. And the adoption of either an executory contract or of a lease by the trustee does not preclude a rejection of it in the plan. Moreover, trackage agreements like leases of railroad tracks and facilities are means by which railroad systems have been assembled. The retention or the sloughing off of trackage agreements may assume importance in the fashioning of a plan of reorganization by the Commission. The problem is kin to that involved in *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & P. Ry. Co.*, 294 U. S. 648. In that case the Court sustained the power of the reorganization court to enjoin under § 77 creditors, who held collateral notes of the debtor railroad secured by its bonds and bonds of its subsidiaries, from selling the collateral under a power of sale in the notes, where the sale would so hinder, obstruct or delay the plan of reorganization as would likely defeat it. The Court stated (p. 676) that a proceeding under § 77 is a "special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile." The Court concluded, in view of the complexity of the problems involved in the reorganization, "that without the maintenance of the *status quo* for a reasonable length of time no satisfactory plan could be worked out." p. 679.

That decision prevented in the interests of a reorganization the enforcement of the provisions of the contracts of the debtor according to their terms. We think like reasons make it important that the *status quo* of this trackage agreement be maintained pending decision by the Commission as to the proper treatment of it in the reorganization plan. The Commission may decide that it should be adopted. Or the Commission may conclude that the trackage agreement should be rejected or that its termination pursuant to its terms should be allowed. These matters involve not only the interests of the two parties to the trackage agreement but phases of the public interest as well. A court which enforced the termination clause of the agreement pursuant to its terms would be narrowing the choice of the Commission and perhaps embarrassing it in the performance of the functions with

which it has been entrusted. For these and like reasons which we have discussed in *Smith* v. *Hoboken Railroad, W. & S. C. Co.*, *supra*, we think the court erred in holding that the trackage agreement had been or should be terminated.

(2) The Commission has further functions to perform apart from determining under § 77 whether it would be consistent with the reorganization requirements of the debtor to terminate the trackage agreement.

By § 1(18) of the Interstate Commerce Act it is provided that "no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment." Carriers being reorganized under § 77 of the Bankruptcy Act are not exempt from that provision. § 77(o), 11 U. S. C. § 205(o); *Warren* v. *Palmer*, 310 U. S. 132, 137-138. Whatever may be the powers of the Commission under the Interstate Commerce Act, rather than § 77, over the terms of the trackage agreement (*Abandonment of Chicago, R. I. & P. Ry. Co.*, 131 I. C. C. 421; *Kansas City So. Ry. Co.* v. *Kansas City Terminal Ry. Co.*, 211 I. C. C. 291), it is clear that the Commission has jurisdiction over the operations. Sec. 1(18) embraces operations under trackage contracts, as well as other types of operations. See *Chicago & Alton R. Co.* v. *Toledo, Peoria & W. Ry. Co.*, 146 I. C. C. 171, 179-181. And the fact that the trackage contract was entered into in 1904 prior to the passage of the Act is immaterial; the provisions of the Act, including §1(18), are applicable to contracts made before as well as after its enactment. See *Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467, 482. Though the contract were terminated pursuant to its terms, a certificate would still be required under § 1(18). Brownsville or its trustee could, of course, make the application for abandonment of operations. But the fact that they might be content with the existing arrangement and fail or refuse to move does not mean that Tex-Mex would be burdened with a trackage arrangement in perpetuity. Tex-Mex might invoke the Commission's jurisdiction under §1(18) and make application for abandonment of operations by Brownsville or its trustee. There is no requirement in § 1(18) that the application be made by the carrier whose operations are sought to be abandoned. It has been recognized that persons other than carriers "who have a proper interest in the

subject matter" may take the initiative.[8] See *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission*, 283 U. S. 380, 393-394. An application by a city and county for abandonment of a part of the Colorado & Southern line was indeed entertained. *Colorado & Southern Ry. Co. Abandonment*, 166 I. C. C. 470. Tex-Mex has even a more immediate interest in the operations over this line. Its property is involved; and the amount being paid for the use of its property is deemed by it insufficient. The Commission is as much concerned with its financial condition as it is with that of Brownsville. Tex-Mex therefore has the standing necessary to invoke § 1(18).

Tex-Mex, however, points out that in 1941 it made application to the Commission "for authority to cancel trackage agreements" with Brownsville and that the Secretary of the Commission returned the application saying "The Commission is without authority to consider an application of the nature submitted by you. Its jurisdiction under Section 1(18) of the Interstate Commerce Act would extend only to abandonment of operation by the St. Louis, Brownsville & Mexico Railway Company." We need not consider whether the application was in proper form for one authorizing and requiring abandonment of operations by Brownsville. In any event, the secretary of the Commission was without authority to bind the Commission in the matter. Cf. *Minneapolis & St. Louis R. Co.* v. *Peoria & P. U. Ry. Co.*, 270 U. S. 580, 585.

(3) The jurisdiction of the Commission is not restricted, however, to determining whether or no operations of Brownsville over the tracks of Tex-Mex should be abandoned. Prior to the Transportation Act of 1940 the Commission had some jurisdiction over trackage agreements of the character involved in this case. *Transit Commission* v. *United States*, 289 U. S. 121. But by that Act the Commission received new, explicit powers over trackage rights. Sec. 5(2)(a)(ii) provides: "It shall be lawful, with the approval and authorization of the Commission, as provided in subsection (b) . . . for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals

[8] Cf. Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co., 270 U. S. 266, 273, which holds that a party in interest who is opposed to construction of an extension may not "initiate before the Commission any proceeding concerning the project", his remedy being to appear in opposition if application is made or to seek an injunction under § 1(20) if no application is made. And see Powell v. United States, 300 U. S. 276.

incidental thereto." Trackage rights acquired without the consent and approval of the Commission are unlawful. § 5(4).

The authority of the Commission under § 5(2)(a) extends to fixing terms and conditions, including rentals, for any trackage agreements entered into subsequent to the effective date of the Transportation Act of 1940. If, therefore, the two carriers had voluntarily terminated the 1904 trackage contract and had entered into a new one without the approval of the Commission, they would have violated the Act. There would be no difference in result merely because the trackage contract expired by its terms or was terminated by operation of an escape clause. Until abandonment is authorized, operations must continue. While they continue, trackage rights are being enjoyed. In absence of administrative control, the law would under those circumstances imply a contract for the use of another's property and award reasonable compensation. Thus trackage rights would be acquired on such terms as the court and jury determined. But § 5(2)(a) vests in the Commission, not the courts, the power to determine the terms and conditions under which trackage rights may be acquired. The jurisdiction of the Commission is exclusive. *Transit Commission* v. *United States, supra.* In that case the Commission had approved a trackage agreement between two carriers and the Court held that the Commission's jurisdiction being exclusive, approval by a state commission was not necessary. The court below thought that case was not controlling here, in view of the fact that the Interstate Commerce Commission had not acted. But in a long line of cases beginning with *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, it has been held that where the reasonableness or legality of the practices of the parties was subject to the administrative authority of the Interstate Commerce Commission, the court should stay its hand until the Commission had passed on the matter. See *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, and cases cited. That course is singularly appropriate here. It is the function of the Commission to determine the terms and conditions under which trackage rights are acquired. If the parties were allowed to by-pass the Commission and litigate the question in the courts, the power to fix the rental under trackage agreements would be shifted from the Commission to the courts and juries. Moreover, one jury would determine the amount of compensation due for the period here in question and another jury

the amount due for a subsequent period. But a major concern of Congress in dealing with this problem was that neither inadequate rentals nor extortionate nor unreasonable exactions would be made for trackage rights. *Transit Commission* v. *United States*, *supra*, p. 128. Those questions intimately relate to the financial strength of carriers. And it is one of the Commission's high functions to protect the public interest against unfair or oppressive financial practices which in the past led to such great havoc and disaster. That policy would be undermined if the carriers could repair to courts for determination of the conditions under which trackage rights could be secured. Then jury verdicts or settlements would take the place of the expert and informed judgment of the Commission.

It is suggested, however, that the Commission is empowered to fix the rental only for the future and that it has no power to make an award with retroactive effect. But on this phase of the case we are not dealing with the problem of reparations. In any case where application is made for trackage rights the terms and conditions fixed by the Commission are applicable when the certificate of public convenience and necessity takes effect. If operations do not start until that time, no problem is presented. But frequently there will be applications for renewal of trackage agreements which have expired. Operations may not be discontinued until a certificate of abandonment is obtained. If new trackage rights are granted, they run from the expiration of the old and their terms and conditions are applicable to the full term.[9] Once the Commission has acted, the court may then proceed to enter judgment in conformity with the terms and conditions specified by the Commission. See *El Dorado Oil Works* v. *United States*, No. 428, decided April 22, 1946.

It is argued, however, that the trackage rights envisioned by §5(2)(a) of the Act are consensual arrangements between the parties; and that the Commission is not granted authority to force a trackage agreement on a carrier. We do not decide what may be the full reach of the power of the Commission under §5(2)(a). We are dealing here with an existing operation, not with a case where one carrier seeks to initiate a new one by ac-

[9] The terms and conditions approved by the Commission in Long Island R. Co. Trackage, 180 I. C. C. 439, affirmed Transit Commission v. United States, 289 U. S. 121, were given retroactive effect in that sense.

quiring the right to run its trains over the tracks of another. The Commission has the power under § 1(18) to refuse to allow abandonment of the operations. If it so refuses, trackage rights continue to be enjoyed by Brownsville. The question of what would be the amount of a fair rental to be paid Brownsville would be highly relevant to a decision by the Commission on the issue of abandonment. We conclude that at least in that situation the Commission has the power under § 5(2) to fix a reasonable rental for the use of the facility by Brownsville regardless of the consent of Tex-Mex.[10] Denial of that power to the Commission is not required by the language of § 5(2)(a). And this construction of § 5(2)(a) is in harmony with the power of the Commission under § 1(18) to refuse to authorize the abandonment of operations. If operations must continue, it is more consistent with this scheme of regulation for the Commission rather than courts or juries to determine the amount of the rental. Any legal, including constitutional, rights of Tex-Mex are protected by the review which Congress has granted the orders of the Commission.

Third. If the Commission granted trackage rights, Tex-Mex could then recover judgment, as we have said, for the amount of the rental fixed by the Commission. If, on the other hand, the Commission authorizes the operations to be abandoned, it "may

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[10] The argument is that the Commission has that authority only under § 3(5) which gives the Commission authority to require the use of terminal facilities including main-line tracks for a reasonable distance outside of the terminal.

Sec. 3(5) provides: "If the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers, shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirements, or just compensation for such use, or both, as the case may be."

attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." § 1(20). The Commission could permit abandonment unless Brownsville paid such reasonable compensation for the use of Tex-Mex's property as the Commission should fix. In that case, too, the court would have an administrative finding as a guide to the judgment it would enter. In case abandonment were authorized without more, respondent would then be free to move in this proceeding for judgment and to apply to the bankruptcy court for compliance with the Commission's order. In all those situations suits to recover the amounts due for use of the tracks of Tex-Mex could be maintained in the state court[11] under the principles announced in *Central New England Ry. Co.* v. *Boston & Albany R. Co.*, 279 U. S. 415, 420. If, however, the Commission decided that the trackage agreement should be dealt with in the plan, the state court would not have power to proceed further. For respondent's rights would be protected by the provisions of the plan which may be reviewed only by the reorganization court. § 77(e).

Thus, however the case may be viewed, the court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved. Until that determination is had, it cannot be known with certainty what issues for judicial decision will emerge. Until that time, judicial action is premature. The judgment will be reversed and the cause remanded so that the case may be held pending the conclusion of appropriate administrative proceedings.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

[11] If the order of the Commission were challenged, its review could of course be had only in the manner provided by statute. See El Dorado Oil Works v. United States, decided April 22, 1946.